Haryadi bin Dadeh v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–12 OF 1998(B) (CRIMINAL TRIAL SELANGOR NO 47–3 OF 1994)

CHONG SIEW FAI CJ (SABAH & SARAWAK), MOHAMAD DZAIDDIN AND ABDUL MALEK AHMAD FCJJ

22 JUNE 2000

Criminal Law *— Dangerous Drugs — Trafficking — Presumption — Whether trial judge erred in invoking presumption of trafficking under s 37(da) based on presumption of possession under s 37(d) — Benefit of doubt to accused — Dangerous Drugs Act 1952 s 37(d) & (da)(vi)*

Evidence *— Presumption — Drug trafficking — Whether trial judge erred in invoking presumption of trafficking under s 37(da) based on presumption of possession under s 37(d) — Benefit of doubt to accused — Dangerous Drugs Act 1952 s 37(d) & (da)(vi)*

The appellant was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. The trial judge found sufficient evidence showing that the appellant had custody and control of 251.06g of cannabis. He then invoked the presumption of possession and of trafficking under s 37(d) and 37(da)(vi) of the Act (ie presumption upon presumption) against the appellant who was called to enter his defence. The judge concluded that from the totality of the evidence adduced, it was clear that the appellant was trafficking the cannabis as there was no evidence suggesting that the cannabis was for his own use. Accordingly, the judge entered a conviction against the appellant for trafficking and sentenced him to death. Before the Court of Appeal, it was submitted that the conviction and sentence were bad and unsustainable by reason that the judge had erred in invoking presumption upon presumption on the mere finding that the appellant had custody and control of the cannabis. The Court of Appeal affirmed the conviction and the sentence. The appellant appealed.

Held:

One cannot rely on the presumption of possession under s 37(d) to invoke a further presumption of trafficking under s 37(da) of the Act. By making a finding of possession and then relying on the provision of presumed possession under s 37(d), the judge had seriously misdirected himself and left the court in serious doubt as to whether he was making a finding of actual possession or was relying on presumed possession under s 37(d). The benefit of doubt ought to be given to the appellant. Thus the court substituted a conviction for possession under s 6 of the Act and sentenced the appellant to ten years' imprisonment and ten strokes of the rotan (see pp 73D–E, 76B, D-E).

[Bahasa Malaysia summary

Perayu telah dituduh dengan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang boleh dikenakan hukuman di bawah s 39B(2) Akta tersebut. Hakim perbicaraan mendapati bukti secukupnya yang menunjukkan bahawa perayu mempunyai dalam kawalan dan jagaannya sebanyak 251.06g kanabis. Beliau kemudiannya menggunakan anggapan pemilikan dan pengedaran di bawah s 37(d) dan 37(da)(vi) Akta tersebut (iaitu anggapan ke atas anggapan) terhadap perayu yang telah dipanggil untuk memasukkan pembelaannya. Hakim tersebut telah memutuskan bahawa daripada keseluruhan keterangan yang dikemukakan, adalah jelas bahawa perayu sedang mengedar kanabis tersebut kerana tidak terdapat keterangan yang menyarankan bahawa kanabis tersebut adalah untuk kegunaannya sendiri. Sehubungan itu, hakim tersebut telah memasukkan satu sabitan terhadap perayu kerana mengedar dan menjatuhkan hukuman mati. Di hadapan Mahkamah Rayuan, telah dihujahkan bahawa sabitan dan hukuman tersebut tidak sempurna dan tidak boleh dipertahankan atas alasan bahawa hakim tersebut telah tersalah pertimbangan dalam menggunakan anggapan ke atas anggapan berdasarkan penemuan semata-mata bahawa perayu mempunyai kawalan dan jagaan akan kanabis tersebut. Mahkamah Rayuan telah mengesahkan sabitan dan hukuman tersebut. Perayu merayu.

Diputuskan:

Seseorang tidak boleh bergantung kepada anggapan pemilikan di bawah s 37(d) untuk menggunakan satu anggapan selanjutnya mengenai pengedaran di bawah s 37(da) Akta tersebut. Dengan membuat keputusan mengenai pemilikan dan kemudiannya bergantung pada peruntukan pemilikan yang dianggapkan di bawah s 37(d), hakim tersebut telah secara seriusnya tersalah arah akan dirinya dan menyebabkan mahkamah berada dalam keadaan keraguan yang sungguh serius berhubung dengan sama ada beliau membuat keputusan mengenai pemilikan sebenarnya atau bergantung pada pemilikan yang dianggapkan di bawah s 37(d). Faedah keraguan haruslah diberikan kepada perayu. Oleh itu, mahkamah telah menggantikan sabitan bagi pemilikan di bawah s 6 Akta tersebut dan menjatuhkan hukuman pemenjaraan selama sepuluh tahun dan sepuluh sebatan rotan terhadap perayu (lihat ms 73D–E, 76B, D-E).]

Notes

For cases on the Dangerous Drugs Act 1952 s 37(d) and (da), see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 77–119.

For cases on the presumption generally, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1591–1679.

Cases referred to

Mat v PP [1963] MLJ 263 (refd)
Mohd Said bin Samad v PP [1998] 2 MLJ 294 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Tunde Aptira & Ors v Pendakwa Raya Mahkamah Persekutuan Rayuan Jenayah No 05–6–97 (unreported) (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37(d), (da)(vi), 39B(1)(a)

Appeal from: Criminal Appeal No B–05–6 of 1996 (Court of Appeal, Kula Lumpur)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Mohd Zaki bin Md Yasin (Deputy Public Prosecutor) for the respondent.

Chong Siew Fai CJ (Sabah & Sarawak) (delivering judgment of the court): On 26 October 1999, we heard and allowed the appeal of the appellant, quashed the conviction (trafficking 251.06g of cannabis) under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and set aside the death sentence, overriding both the learned trial judge and the Court of Appeal, and substituted therefor a conviction for possession under s 6 of the Act and sentence him to ten years imprisonment with effect from 6 September 1993 (the date of his arrest) and ten strokes of the rotan. We indicated that grounds for the decision would be given later. These we now give.

In the High Court, the charge, as amended, against the appellant was as follows:

> Bahawa kamu pada 6 September 1993 jam lebih kurang 8.10 pagi di sebuah rumah kedai No 2, Kampung Pinang Tunggal, Bt $6^1/_2$ Jalan Klang Lama, dalam Daerah Petaling Jaya, dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu jenis cannabis seberat 251.06g dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah s 39B(2) Akta yang sama.

The amended charge may be translated into English thus:

> That you on 6 September 1993 at about 8.10am at shophouse No 2, Kampung Pinang Tunggal, $6^1/_2$ mile, Klang Lama Road, Petaling Jaya, Selangor Darul Ehsan, had trafficked in dangerous drug, to wit, 251.06g of cannabis, and you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act.

Case for the prosecution

Acting on information received, PW3, ASP Lau Kam Chee assembled a team of police officers and raided shophouse No 2, Kampung Pinang Tunggal, $6^1/_2$ Mile, Jalan Klang Lama, Petaling Jaya, Selangor. The police party broke up into two groups PW6, Lance Corporal Abdul Ghaffar bin Haji Tahir, and two other policemen were entrusted to guard the back

portion of the shophouse whilst PW3 and his men proceeded to the front of the shophouse. PW3 then entered the shophouse and straightaway arrested an Indonesian man named Ismail bin Mohamad found therein. Meanwhile, whilst proceeding to his assigned position, PW6 peered inside a makeshift and roofless bathroom outside the shophouse and saw the appellant in the process of rolling ganja and sitting cross-legged with an aluminium pot containing ganja leaves on his lap. Upon seeing PW6, the appellant immediately got up and ran inside the shophouse. He then ran out again and crashed through the bathroom wall outside with PW6 in hot pursuit. The appellant was eventually cornered and arrested by PW6 with the assistance of PW9, Lance Corporal Rahim bin Md Diah. A search was conducted of the bathroom in which a package containing 600 rolls of ganja was found in one corner and another package containing a slab of ganja was recovered under a lamp. The drugs were analysed by a government chemist, PW7, Chan Kee Bian, who confirmed that the materials were cannabis as defined in s 2 of the Act with a combined weight of 549.36g. It would, however, be pertinent to mention here that at the close of the case for the prosecution, the learned trial judge found that the slab of cannabis recovered under the lamp, weighing 298.3g was not in the appellant's possession. Accordingly, the weight of the cannabis in the charge was amended to 251.06g. There was no appeal in respect of this finding.

As regard the amended balance 251.06g, the learned trial judge found sufficient evidence showing that the appellant had custody and control of the same. He then invoked the presumption of possession and of trafficking under s 37(d) and 37(da)(vi) of the Act (ie presumption upon presumption) against the appellant, who was called to enter on his defence.

The defence

The defence of the appellant consisted solely of his own sworn testimony. The appellant denied being in possession of the incriminating cannabis found in the bathroom and further denied rolling cannabis when PW6 saw him as testified by the latter. His explanation of being in the bathroom was to answer a call of nature, and his reason for fleeing upon seeing the policemen in the shophouse was that his friend (one Ismail) who had already been arrested in the house, told him to run. The learned trial judge acknowledged that although the appellant's defence was one of bare denial, on the authority of *Mat v PP* [1963] MLJ 263 he was nevertheless legally bound to consider if the defence put forward was capable of raising a reasonable doubt on the prosecution's case.

High Court

After evaluating the testimony of the appellant, the learned trial judge found on balance of probabilities and the appellant had failed to raise any reasonable doubt on the prosecution's case and had also failed to rebut the two statutory presumptions invoked by him earlier. The learned trial judge concluded that from the totality of the evidence adduced, it was clear that the appellant was trafficking 261.06g of cannabis as there was no evidence

A suggesting that the cannabis was for his own use. Accordingly, the learned trial judge entered a conviction against the appellant for trafficking and sentence him to death. Against the conviction and the sentence the appellant appealed to the Court of Appeal.

B *Court of Appeal*

Before the Court of Appeal, it was submitted on behalf of the appellant that the conviction and the sentence were bad and unsustainable by reason that the learned trial judge had erred in invoking presumption upon presumption referred to earlier on the mere finding that the appellant had custody and control of the said cannabis. *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 and *Mohd Said bin Samad v PP* [1998] 2 MLJ 294, were cited in support of the contention.

The Court of Appeal, however, reviewed, inter alia, the testimony of PW6 the eye witness, who saw the appellant alone in the bathroom rolling the ganja leaves and fleeing upon noting the presence of the police in the D shophouse, and agreed with the deputy public prosecutor that the learned trial judge was justified in concluding that the appellant was in possession of the cannabis and had correctly invoked the presumption of trafficking under the Act. They also concurred with the deputy public prosecutor that the learned trial judge had not contravened any part of the two Federal Court decisions cited above. The conviction and the sentence were E affirmed.

Federal Court

Before us, the sole issue was the invocation of presumption upon F presumption. Relying on *Muhammed bin Hassan*, counsel for the appellant submitted that the learned trial judge had erred in invoking the double presumptions. Though conceding that there has been a finding of the appellant being in custody and control of the 251.06g of ganja, counsel contended that the learned trial judge had seriously misdirected himself by invoking the presumption of possession under s 37(d) of the Act. It was also G argued that since there had been no finding of actual possession of ganja, the presumption of trafficking under s 37(da) of the Act could not be invoked.

Muhammed bin Hassan, which counsel for both sides informed us that it had been affirmed by this court comprising of a panel of five judges in *Tunde Aptira & Ors v Pendakwa Raya*, Mahkamah Persekutuan Rayuan H Jenayah No 05–6–97 (unreported), decided in, essence so far as is relevant to this case, that a presumed possession under s 37(d) of the Act could not be based to invoke the presumption of trafficking under s 37(da) of the Act thereof, and that to arrive at the presumption of trafficking under s 37(da) of the Act, and express, affirmative finding of possession as understood in I criminal law, based on evidence, is necessary.

For the respondent, the learned deputy public prosecutor, whilst pointing out that the learned trial judge had found possession, conceded

that the learned trial judge had, in his judgment, also relied on s 7(d) of the Act (presumed possession) to invoke s 37(da) of the Act (presumed trafficking). A

Having considered the evidence adduced and the submissions of counsel for both sides, we unanimously allowed the appeal as aforesaid. The ratio decided in *Muhammed bin Hassan*, is clear. One cannot rely on the presumption of possession under s 37(d) of the Act to invoke a further presumption of trafficking under s 37(da) of the Act. In the instant case under appeal, the learned trial judge held that the appellant was in possession of 251.06g of cannabis. It would have been in order if, based on the express finding of possession, he proceeded to invoke the presumption of trafficking under s 37(da) of the Act. But this was not what he did. Immediately thereafter, he found the appellant in custody and control of the cannabis and held that therefore the presumption of possession under s 37(d) of the Act applied. He then went on to say that likewise because the accused was in possession of more than 200g of cannabis, the presumption of trafficking under s 37(da)(vi) of the Act applied. Towards the conclusion of his judgment, the learned trial judge said, inter alia, that the appellant had failed to rebut the statutory presumptions under s 37(d) of the Act (presumed possession) and s 37(da)(vi)(presumed trafficking) of the Act. By making a finding of possession and then relying on the provision of presumed possession under s 37(d) of the Act, the learned trial judge had seriously misdirected himself and leaves us in serious doubt as to whether he was making a finding of actual possession or was relying on presumed possession under s 37(d) of the Act. The benefit of doubt ought, in our view, be given to the appellant. B C D E

For the above reasons, we came to the conclusion as set out at the commencement of this grounds of judgment

Appeal allowed. F

Reported by Jafisah Jaafar

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